United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

No. 74-1697

74-1697

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SIRBO HOLDINGS, INC.,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISION OF

THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

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STATEMENT OF THE ISSUE PRESENTED

Whether the Tax Court was correct in holding that $125,000 paid to the taxpayer in 1964 by its tenant, Columbia Broadcasting System, Inc., for a release from an obligation to restore rented premises to their earlier condition, or to indemnify taxpayer for the expense of doing so, constituted ordinary income and not, as the taxpayer contends, proceeds from the sale or exchange of property giving rise to long-term capital gain.

STATEMENT OF THE CASE

This case involves a deficiency in federal income taxes of Sirbo Holdings, Inc. (taxpayer) for its fiscal year ended June 30, 1964, in the amount of $53,573.30 asserted by the Commissioner of Internal Revenue in a notice of deficiency dated November 20, 1968. (R. 8-10.)[1/] Taxpayer filed a timely petition in the Tax Court seeking redetermination of the deficiency asserted. (R. 3-10.) After hearing, the Tax Court (Hon. William H. Quealy) on January 27, 1972 filed its findings of fact and opinion (R. 208-232), officially reported at 57 T.C. 530, and on February 7, 1972, entered its decision upholding the determination of the Commissioner that there was a deficiency of $53,573.30 in taxpayer's federal income taxes for its taxable year ended June 30, 1964. (R. 233.) Following the denial, on April 18, 1972, of taxpayer's motions for special leave to file a motion for reconsideration and a motion to vacate the decision of February 7, 1972 (R. 234-239), taxpayer filed a timely notice of appeal to this Court (R. 240). After hearing, this Court on March 2[illegible], 1973, entered its opinion (S.R. 5-19), officially reported at 476 F. 2d 981, vacated the decision of the Tax Court, and remanded the case to that court for further proceedings consistent with its opinion. The record in the Tax Court was thereafter

1/ "R." references are to the separately bound record appendix filed in this Court in No. 72-1617 on the prior appeal of this case, and authorized to be used herein by this Court's order of July 26, 1974. "S.R." references are to the separately bound supplemental record appendix filed on this appeal.

supplemented by stipulation (S.R. 20-64), and the case on remand was heard on the supplemented record and on briefs. (S.R. 65-129.) On March 13, 1974, the Tax Court (Hon. William H. Quealy) entered its unanimous reviewed supplemental opinion (S.R. 130-139), officially reported at 61 T.C. 723, reaffirming its earlier opinion. The decision of the Tax Court was entered on March 15, 1974. (S.R. 140.) Taxpayer filed a timely notice of appeal to this Court on April 29, 1974. (S.R. 141.) Jurisdiction is conferred upon this Court by Section 7482 of the Internal Revenue Code of 1954.

The facts of the case, as they appear from the evidence, including stipulations and exhibits, presented at the hearings (R. 12-207; S.R. 20-64), and as found by the Tax Court (R. 208-232; S.R. 130-139), may be summarized as follows:

Taxpayer is a New York corporation organized in 1944, with its principal office in New York, New York. It is engaged in the business of renting real estate. It keeps its books and records, and files its federal income tax returns, on an accrual method of accounting, and for a fiscal year ending June 30. (R. 209-210.)

On or about July 8, 1944, taxpayer purchased for $400,000 commercial property located at 254-258 West 54th Street, and 229-237 West 53rd Street, New York, New York. The property consisted of land and a building. The building was a 16-story penthouse and basement building containing offices and, on its

lower floors, The New Yorker Theatre, which had been constructed in the 1920's. (R. 210-211; Ex. 13, R. 193.) When taxpayer purchased the property, the theatre portion was subject to an existing lease from the then owner, the Bowery Savings Bank, to Columbia Broadcasting System, Inc. ("CBS"). Under that lease, which extended from September 7, 1943, to September 12, 1948, CBS had the right to use the leased premises "as a theatre, and for radio broadcasting and television purposes, * * * and for the general purposes of its business." It was understood that extensive structural and non-structual changes might be made. (R. 211.) At this time, however, CBS was using the theatre as a radio studio, and this required very little change. (R. 85.) The lease also provided that the tenant, at the expiration of the term, would remove its equipment from the premises, would deliver up the premises in as good order and condition as reasonable wear and tear and damage by the elements would permit, would restore the premises substantially to the condition in which they existed at the time of the making of the lease, reasonable wear and tear and damage by the elements excepted, and would indemnify the landlord for all costs and expenses that might be required for reinstating the premises to the condition in which they existed at the outset of the lease. (R. 212; Ex. 8-H, R. 184f.) By letter dated July 11, 1944, taxpayer notified CBS that it had purchased the property and had assumed all of the terms,

conditions, covenants and obligations of the existing lease. (R. 174; Ex. 9-I, R. 184g.)

On November 14, 1947, taxpayer and CBS executed a new lease of the theatre premises to commence September 13, 1948, and to extend to September 12, 1953. Under successive leases and extensions thereof, taxpayer rented the theatre premises to CBS at least until December 31, 1968. Under each lease, CBS continued to have the right to use the premises as a theatre and for radio and television broadcasting purposes. (R. 212-213, 214, 215, 216, 221-222; Ex. 2-B, R. 175c-175h; Ex. 3-C, R. 176-181; Ex. 4-D, R. 181a; Ex. 5-E, R. 182-183; Ex. 6-F, R. 184; Ex. 7-G, R. 184a-184d.) Each of the three leases that, with extensions, covered the period from September 13, 1948, through December 31, 1963, contained in its Article FOURTH a restoration and indemnification provision similar to the one contained in the original lease from the Bowery Savings Bank to CBS except for the fact that in these leases the date to which the restoration obligation related was November 14, 1947. (Ex. 2-B, R. 175g-175h; Ex. 3-C, R. 181; Ex. 5-E, R. 183.) In terms, the final one of these three leases provided as follows (Ex. 5-E, R. 183):

> FOURTH:- At the expiration or other termination of the term hereby granted, the TENANT shall and will leave the said premises and the theatre whole and in good order and condition and will remove therefrom every and all its equipment, goods, and effects, and those of all persons claiming under it, and will deliver up the demised premises in good order and condition, reasonable wear and tear and damage by the elements excepted, it being understood that all scenery therein, stage hangings, properties, decorations and

equipment, including but not limited to radio and/or audio equipment, and its associated equipment, installed and paid for by the TENANT, which may be affixed to or contained in the herein demised premises may be removed by the TENANT whether the same constitutes fixtures or not, provided, however, that the TENANT shall restore the premises substantially to the condition in which they existed on November 14, 1947, reasonable wear and tear and damage by the elements excepted, and the TENANT shall fully indemnify the LANDLORD for every and all costs and expenses of whatsoever name or nature that may be required for the purposes of reinstating the premises to said condition. TENANT agrees to restore any and all seats heretofor removed by TENANT, to remove the control booths installed by TENANT and to remove the extension of the stage apron installed by TENANT.

Some time after November 14, 1947, CBS began to make changes in the physical arrangement of the theatre in order to adapt it for use by CBS as a television studio. These changes included the removal of approximately 300 to 400 theatre seats, the elimination of all carpeting, chandeliers and stage curtains; the extension of the stage area into what was formerly the audience area, a change in the floor level and the elimination of the "loop" in the former seating arrangement, the construction of walls and partitions and appropriate structural changes to accomodate control rooms, the alteration of bathrooms and the heating system, and the installation of thousands of feet of electrical wiring. (R. 213-214.) As testified by the president of the real estate management firm in charge of taxpayer's property (taxpayer's stockholders were his parents), permits from the city were required before CBS could make alterations or modifications or structural changes. (R. 29, 60, 66-67.)

Referring to blueprints required to obtain such permits, he described the work as follows: "new control room, stage extension, TV control room alteration, proposed TV facilities, new TV control room alterations, proposed TV facilities, air conditioned TV equipment room, air conditioned equipment room, et cetera." (R. 60-61.)

Prior to December 31, 1963, CBS determined, as a matter of corporate policy, to eliminate restoration clauses from leases that it held on theatres in New York. It notified taxpayer of this decision. The taxpayer and CBS thereupon undertook negotiations for a new lease extending from January 1, 1964, reserving negotiation of the obligation arising from paragraph FOURTH of the existing lease until after they reached tentative agreement on the terms of a new lease. As a result of the negotiations with regard to the new lease, CBS sent to taxpayer a letter, bearing date of December 24, 1963, to serve as a memorandum of agreement with respect to the provisions of a new lease. As set forth in this letter, CBS would leave on the premises at the termination of the lease personal property such as seats, carpets, and other theatre equipment, not including technical gear. There was to be no obligation of the tenant to return the premises to a condition other than that which existed on January 1, 1964. CBS would also repair damage, if any, created by removal of its technical gear and equipment pertinent to its business, and would, at the landlord's option,

remove alterations or additions made after January 1, 1964, and repair any damage caused thereby. (R. 216-217; Ex. L, R. 204-205.)

After the basic provisions of the new lease had been agreed upon, the parties entered into negotiations with respect to the amount that CBS would pay to be released from its obligation under paragraph FOURTH of the expiring lease. As a result of these negotiations, the parties executed in January, 1964, a document dated December 31, 1963, and prepared by the law firm of Salter and McGowan, taxpayer's attorneys in this litigation, whereby CBS agreed to pay taxpayer $125,000, and taxpayer, acknowledging receipt of payment, released CBS from all claims taxpayer might have under paragraph FOURTH of the lease agreement dated July 15, 1958, as renewed or extended. (R. 217-218; Ex. 11, R. 187-189.) In negotiating the $125,000 amount, CBS considered the payment as part of the cost of occupying the theatre. At no time during the period of negotiation and agreement did the parties intend or contemplate that the premises would be restored to their condition of November 14, 1974. (R. 218.) As of December 31, 1963, the optimum use of the theatre was as a television studio. (R. 162, 222a.) CBS had other television studios located in the same area, which was in the heart of the television broadcasting industry. (R. 152, 222a.)

On January 31, 1964, taxpayer and CBS executed a new lease of the theatre premises, effective from January 1, 1964, for a term of five years. (R. 221-222; Ex. 7-G, R. 184a-184d.) Taxpayer

also on that date executed a general release of CBS from any liability under the prior lease or use, occupancy, alteration, addition, removal or improvement of the premises or any property or equipment related thereto. (R. 221; Ex. 10-J, R. 185-186.) The termination clause of the new lease provided (R. 222; Ex. 7-G, R. 184d):

> FOURTH:- At the expiration or other termination of the term hereby granted, Tenant shall and will leave the said premises and the theatre whole and in good order and condition, reasonable wear and tear and damage by the elements excepted, and if requested by the Landlord, will remove therefrom every and all of Tenant's equipment, goods, and effects, it being understood that all scenery, stage hangings, properties, decorations and equipment, including but not limited to cameras, consoles, radio, audio and television technical gear and associated equipment, installed and paid for by Tenant, which may be affixed to or contained in the herein demised premises may, and at the timely request of Landlord shall, be removed by Tenant whether the same constitutes fixtures or not, provided, however, that if and only if Tenant shall make any alterations, installations or additions in or to the demised premises subsequent to January 1, 1964, Tenant shall at the timely request of Landlord remove any such alterations, installations or additions and shall repair any damage caused thereby.
>
> Landlord's requests, hereinbefore referred to, shall be made by written notice delivered to Tenant not later than June 30, 1968. Except as herein otherwise provided, Tenant shall have no obligation whatever of restoration.

As of January 1, 1964, taxpayer's original cost basis of $266,666.67 in the building (including both the office section and the theatre but excluding, of course, the amount of the purchase price allocated o the land) had been reduced by depreciation to $93,333.51. On its corporate income tax return for its taxable year ended June 30, 1964, taxpayer reported the $125,000 received

from CBS as proceeds from involuntary conversion of property. It applied against this amount its adjusted basis of $93,333.51 in the entire building, and treated the difference as long-term capital gain. The Commissioner of Internal Revenue asserted a deficiency upon the ground that the $125,000 payment constituted ordinary income to the taxpayer, while at the same time allowing an additional deduction for depreciation with respect to the building in the amount of $4,444.44. Taxpayer's claim that the $125,000 paid by CBS represented proceeds from the involuntary conversion of property, reasserted in its petition for redetermination of the deficiency, was rejected by the Tax Court, which upheld the Commissioner's determination of a deficiency of $53,573.30. (R. 223-224, 225-232, 233; Ex. 1-A, R. 175b.)

More than thirty days after the decision of the Tax Court, taxpayer filed a motion for special leave to file a motion for reconsideration, and a motion for special leave to file a motion to vacate the decision of the Tax Court. Each was on the asserted ground that a more recent decision of the Tax Court, in Boston Fish Market Corp. v. Commissioner, 57 T.C. 884 (1972), was irreconcilable with its decision in this case. On April 18, 1972, the Tax Court denied both motions. (R. 234-239.) Taxpayer thereafter appealed to this Court. (R. 240.)

In its brief and reply brief in this Court, taxpayer reiterated its position that it was entitled to capital gain treatment of the funds received from CBS by virtue of the asserted involuntary conversion of its property. Because of its reliance

on the "involuntary conversion" language of Section 1231 of the Internal Revenue Code of 1954 (26 U.S.C.), it criticized as irrelevant (Br. 18) the Tax Court's reference to "sale or exchange" and its reliance upon this Court's decision in Billy Rose's Diamond Horseshoe, Inc. v. United States, 448 F. 2d 549 (1971). Its reply brief was largely devoted to an argument that the Billy Rose decision was, as taxpayer phrased it (Br. 13), "legally irrelevant" because, on similar facts, it had been decided on the ground that there was no sale or exchange.

This Court agreed with the Tax Court in rejecting taxpayer's claim "Insofar as petitioner rested its claim to capital gains treatment on the involuntary conversion clause of §1231." (S.R. 11-13.) It stated, however, that (S.R. 14) "Sirbo * * * contended in the alternative that the transaction constituted a sale or exchange of property used in the trade or business." On this basis, it noted possible support for the taxpayer's position in this Court's decision in Commissioner v. Ferrer, 304 F. 2d 125 (1962), and possible inconsistency between this Court's Billy Rose and Ferrer decisions. It noted also the asserted inconsistency between the Tax Court's decision in this case and its decision in the Boston Fish Market case, and suggested that the Tax Court might have felt bound to follow Billy Rose in this case because appeal would lie to this Court. At the same time, despite the ratio decidendi of the Billy Rose opinion, it suggested that it was not "squarely in point" because that case arose under Section 453 of the Internal Revenue Code while the present case arose under Section 1231. It therefore,

remanded the case to the Tax Court, "hopefully the full court", to decide whether it would follow Boston Fish Market if free to do so, as the Court indicated it was. (S.R. 14-19.)

On the remand to the Tax Court, by stipulation of the parties and order of the Tax Court (S.R. 20-24), the record herein was enlarged by filing herein the Tax Court record in the Boston Fish Market case, and briefs were filed with respect to the matters set forth in the opinion of this Court. (S.R. 65-129.)

In a reviewed and unanimous opinion entered on March 13, 1974, and reported at 61 T.C. 723 (S.R. 130-139), the Tax Court (Hon. William H. Quealy) adhered to its earlier decision. It noted that in the Boston Fish Market case the issue before the court was whether funds received in discharge of an obligation under a restoration clause were wholly exempt from tax under Section 109 of the Internal Revenue Code, as the lessor claimed. In asserting that the funds were includible in taxable income, the Commissioner had conceded that they were subject to capital gain treatment--a concession now recognized to have been mistaken. But because of the concession, the Tax Court did not consider the question, and might have decided it differently had the question been before it. Once the Tax Court in the Boston Fish Market case had rejected the lessor's claim that the funds received were exempt from taxation, the only question before it was the amount of taxable income received, and its discussion related to the question of measure, not characterization, of income.

(S.R. 137.) Turning to the question of sale or exchange as a requirement for capital gain treatment in this case under Section 1231, the Tax Court stated its full agreement with this Court's decision in Billy Rose, which it found indistinguishable in principle. It found no incompatibility with this Court's Ferrer decision. Here, when CBS paid taxpayer $125,000, there was no sale, there was no exchange, and nothing reverted to CBS. There was therefore no basis for treating the $125,000 received by taxpayer as other than ordinary income. (S.R. 137-139.) Consequently, on March 15, 1974, the Tax Court entered its decision again finding a deficiency in income tax due from taxpayer for the taxable year ended June 30, 1964, in the amount of $53,573.30. (S.R. 140.)

SUMMARY OF ARGUMENT

From the outset of special treatment for the taxation of capital gains in 1921, the Congress has consistently provided that capital gains and losses should result from "sales or exchanges." The Supreme Court has without exception required that those words be given their accustomed meaning, without enlargement or restriction. When the Congress has wished to provide that capital treatment should be accorded the results of other transactions it has, with particularity and detail, provided that such transactions should be treated as sales or exchanges. The very particularity of such legislation negates any inference that the statutory requirement of "sale" or "exchange" could otherwise be relaxed.

In this case, the $125,000 paid to taxpayer by CBS for release from an obligation to restore leased premises was not the proceeds of a sale or exchange, but payment for a discharge from an obligation. Had some small part of that payment been properly attributable to a price for used equipment removed from the leased premises an allocation could have been made if taxpayer had furnished any basis therefor. The record, however, offers no support for an assumption or inference that any part of the payment was a price for equipment removed. On the contrary, taxpayer's income tax returns and the understandings embodied in the new lease are inconsistent with such an assumption or inference.

Beyond the possibility, negated by the record, of allocating a small part of the payment to a price for used equipment removed from the leased premises, there is no substantial issue in this case. The Supreme Court and this Court, as well as other courts, have held that discharge of an obligation does not give rise to capital gain. Nothing in the Ferrer decision is inconsistent with those decisions. If peripheral implications from the opinion in that case suggest inconsistency, those implications are not borne out by decisions of this Court before and after Ferrer, by the governing decision of the Supreme Court, or by the provisions of the Internal Revenue Code.

The Commissioner has acknowledged that the concession of capital gain treatment in the Boston Fish Market case was an error, and the Tax Court has accepted that acknowledgment.

To use an error made in one tax case as the standard for decision in a similar but otherwise unrelated case would reduce administration of the Internal Revenue Code to its lowest discoverable level. The error made in conceding capital gain treatment in the Boston Fish Market case gives no reason for deciding this case other than on its merits.

ARGUMENT

I

THE TAX COURT CORRECTLY HELD THAT THE SUM OF $125,000 RECEIVED BY TAXPAYER FROM CBS WAS NOT PROCEEDS FROM THE SALE OR EXCHANGE OF PROPERTY, AND THEREFORE WAS NOT SUBJECT TO CAPITAL GAIN TREATMENT

When the Congress first provided special treatment for capital gains in Section 206 of the Revenue Act of 1921, c. 136, 42 Stat. 227, it defined "capital gain" and "capital loss" in Section 206(a)(1) and (2) as taxable gain and deductible loss, respectively, "from the sale or exchange of capital assets consummated after December 31, 1921." "Sale or exchange" has remained as an integral and limiting part of the statutory definition of capital gains and capital losses in every income tax statute since that time, now appearing in the definitional provisions of Section 1222 of the Internal Revenue Code of 1954, (26 U.S.C.)

as well as in Section 1231.[2/] Upon the periodic occasions when the Supreme Court has been required to consider the phrase in deciding issues of capital gains and losses, it has without exception refused either to enlarge or to restrict the phrase beyond its normal and accustomed meaning. It has refused to enlarge the phrase to encompass payments for the removal of minerals from leased premises by the lessee,[3/] or payments in discharge of indebtedness,[4/] or payments of insurance upon the destruction of property.[5/] It has similarly refused to restrict the scope of "sale or exchange" so as to exclude sales that were

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2/ The other, and separate, limitation upon capital gain and loss arises from the definition of "capital asset," now contained in Section 1221. In effect, the limitations contained in Sections 1221 and 1222 are to some extent modified by Section 1231 with respect to net gains, but not with respect to net losses. See Commissioner v. Gillette Motor Co., 364 U.S. 130, 133-135 (1960). Cf. Surrey, Definitional Problems in Capital Gains Taxation, 69 Harv. L. Rev. 985 (1956).

3/ Burnet v. Harmel, 287 U.S. 103 (1932).

4/ Fairbanks v. United States, 306 U.S. 436 (1939).

5/ Helvering v. Flaccus Leather Co., 313 U.S. 247 (1941). Cf. Commissioner v. Gillette Motor Co., 364 U.S. 130 (1960).

involuntary, pursuant to mortgage[6/] or tax lien[7/] foreclosures, or sales where the price was to be paid only from earnings from the property transferred.[8/] When, beginning with Section 201(c) of the Revenue Act of 1924, c. 234, 43 Stat. 253, the Congress has wished to provide that other transactions should give rise to capital gain and loss treatment, or either, it has provided with particularity, and often with great definitional detail, that such transactions should be treated as sales or exchanges.[9/]

In this case, we believe it clear that the $125,000 received by taxpayer from CBS for discharge of the latter's obligation to restore the theatre to its 1947 condition were not proceeds of a sale or exhcnage. This Court in Graham v. Commissioner, 304 F. 2d 707, 708 (1962), recognized that "It is well settled that the payment of an obligation cannot be a 'sale or exchange,'" and so held. Of course, if CBS had bought, and were paying for, the used seats, carpets, chandeliers, and stage curtains that were removed from the theatre, then some small part of

6/ Helvering v. Hammel, 311 U.S. 504 (1941); Electro-Chemical Co. v. Commissioner, 311 U.S. 513 (1941).

7/ Helvering v. Nebraska Bridge Supply & Lumber Co., 312 U.S. 666 (1941), rev'g 115 F. 2d 288 (C.A. 8, 1940).

8/ Commissioner v. Brown, 380 U.S. 563 (1965).

9/ See, e.g., Sections 165(g), 166(d), 331, 1232(a), 1234, 1235, 1240, 1241. For Supreme Court consideration of such provisions, see, e.g., White v. United States, 305 U.S. 281 (1938); McClain v. Commissioner, 311 U.S. 527 (1941); United States v. Generes, 405 U.S. 93 (1972).

its $125,000 payment might, under Section 1231, give rise to capital gain from the sale of depreciable property used in trade or business, provided taxpayer had supplied evidence to support an allocation of price and basis. But the record in this case, in the original hearing and after remand, contains nothing to supply either element necessary to support taxpayer's claim.

A. The specifics of this case

We note at the outset that it is well established that payments made in compromise or settlement of a claim are characterized for purposes of taxation by the nature of the claim. Lyeth v. Hoey, 305 U.S. 188, 196-197 (1938). As this Court stated in South Bay Corp. v. Commissioner, 345 F. 2d 698, 709 (1965), "Its character as an income or capital receipt was determined by the nature of the claim upon which it was received." That fundamental proposition established, we turn to an examination of the nature of taxpayer's claim against CBS.

This Court appears to have assumed on the prior hearing that CBS had an obligation to pay for the used seats and other items of equipment that were removed from the theatre, and that part of the $125,000 payment was in discharge of that obligation. (S.R. 14-15.) But the record offers no support for that assumption, and contains at least two indications that it is erroneous.

1. There is no showing in the record of the disposition of the used seats, etc., when removed from the theatre. It can hardly be presumed that CBS wanted or took them as its own. They may have been delivered to taxpayer for storage and re-installation, if needed for that purpose. Or, coming from a theatre that was approximately twenty years old in 1947, it is perhaps more probable that they were deemed worthless by taxpayer, and junked at its direction or with its consent. Neither hypothesis, nor any offered by taxpayer, would support an obligation by CBS to pay for the used seats, etc., as a buyer. An obligation to restore, if it meant more than an obligation to bear the cost of re-installing taxpayer's equipment, would be an obligation to restore property subject to an additional sixteen years of normal wear and tear, for which CBS was not responsible. Pennsylvania Cement Co. v. Bradley Contracting Co., 11 F. 2d 687 (C.A. 2, 1926). Even beyond the normal burden of proof that taxpayer must bear, these circumstances demonstrate that it was incumbent upon it to demonstrate that in 1963 it had any substantial claim to payment for property installed in a theatre built in the 1920's.

2. The taxpayer itself did not treat the equipment removed from the theatre as sold to CBS. When it purchased the building containing the theatre in 1944, it allocated $133,333.33 of the $400,000 purchase price to land, and $266,666.67 to the building, including all its equipment. (R. 222a.)

Its own income tax returns disclose that it continued to use the $266,666.67 figure as its basis for depreciation through 1963, unadjusted for removal or sale of any items from its property account. (Ex. 1-A, R. 175b.) Having taken deductions for depreciation on these items for the sixteen years after 1947, it is hardly in a position now to claim that they were sold at the outset of that period. Whether by estoppel or simply as a matter of evidence, taxpayer's income tax returns negate its claim to have sold equipment to CBS.

3. When CBS on December 24, 1963, wrote to taxpayer to set forth a memorandum of understanding with respect to the new lease that would extend through 1968 (Ex. L, R. 204-205), it stated (R. 204), "All personal property owned by Tenant and now located on the premises, such as <u>seats, carpet, and other theatre equipment</u>, but not including Tenant's technical gear * * * shall be left on the premises at the expiration of the lease." (Emphasis supplied.) The lease, as executed, was not explicit on these items but they appear to have been included in those items that were to be removed only "if requested by the Landlord." (Ex. 7-G, R. 184d.) Since CBS expected to leave seats, carpet, and other theatre equipment that it had installed, and taxpayer had every reason to expect them to be left if it wished them, there is no basis for attributing any part of the $125,000 payment that the parties negotiated to a price for the similar items that had earlier been removed. If taxpayer was in any way to be compensated

for equipment earlier removed, that compensation would come not from the $125,000 cash that CBS paid but in the form of the equipment that CBS had installed and expected to leave in the theatre at the end of its tenancy.

Even if the record did give any support to taxpayer's claim that it was being paid for equipment earlier removed from the theatre, as we believe it does not, it would nevertheless be clear that only a minuscule part of the $125,000 paid could be attributed to compensation for that equipment. As we have noted earlier, it would have been approximately thirty-six years old at the end of 1963, subject to wear and tear for which CBS was not responsible. On the other hand, CBS had installed the complex technical equipment for television broadcasting, wiring, control rooms, structural supports, air conditioning equipment, a larger stage apron, and the like. Taxpayer can make no claim that it sold these items to CBS, and that the $125,000 represented payment for them. These are items costly to install, costly to remove, and costly to clean up after. But no part of these costs to CBS represented proceeds of a sale or exchange by taxpayer, and CBS' payment in avoidance of such costs could only be ordinary income to taxpayer. If there were basis, as we believe there is not, for allocating some small part of CBS' payment to a purchase of used seats and other items of removed equipment, taxpayer has supplied no method for such an allocation, either on the

original hearing of this case, or on remand, and has made no showing of the cost attributable to such items. Under such circumstances, the Tax Court would in any event have been correct in treating the whole amount received as ordinary income. Washington Fireproof Building Co. v. Commissioner, 31 B.T.A. 824 (1934) (majority and concurring opinions).

B. The Billy Rose, Ferrer, and Central Tablet decisions

We believe we have shown that there is no support for a claim that even a small part of the $125,000 received by taxpayer was payment for equipment removed from its theatre, and therefore proceeds of a sale or exchange of property. Beyond that, it is difficult to see that there is any substantial issue in this case, and we find no other spelled out in taxpayer's brief. Since this Court, however, has suggested inconsistency in its own decisions having bearing upon this case (S.R. 18), we proceed to a discussion of those cases.

This Court in Billy Rose's Diamond Horseshoe, Inc. v. United States, 448 F. 2d 549 (1941), on similar facts, held that no sale was involved. Once any issue of removed equipment is put aside, that decision appears to be unquestionably correct. We believe it to be both fruitless and unnecessary to debate whether "sale" in Section 453 of the Internal Revenue Code, involved in that case, may have a meaning or content different

from "sale" in Sections 1222 and 1231. If it might have, then "sale or other disposition" in Section 453(b)(1)(A) at least textually indicates a broader scope than "sale or exchange" in Sections 1222 and 1231. The question seems irrelevant since the Billy Rose panel of this Court clearly intended no differentiation, and based its decision on no differentiation, in view of the capital gains decisions of this Court that it referred to in support of its decision.[10/] We do feel it incumbent upon us to point out, however, that taxpayer somewhat distorts legislative history in suggesting (Br. 21) that "sale or exchange" in Section 1231 postdates the installment sales provisions by sixteen years. It is true that Section 1231 dates back only to 1942, when Section 117(j) was added to the Internal Revenue Code of 1939, modifying Section 117(a) as Section 1231 now modifies Sections 1221 and 1222. But, as we have pointed out earlier, the "sale or exchange" phraseology in Section 117(a) dated back to 1921, and there is hardly reason to think it may have had different content in Section 117(j).

10/ Pittston Co. v. Commissioner, 252 F. 2d 344 (C.A. 2, 1958), cert. denied, 357 U.S. 919 (1958); General Artists Corp. v. Commissioner, 205 F. 2d 360 (C.A. 2, 1953), cert. denied, 346 U.S. 866 (1953); Commissioner v. Starr Bros., Inc., 204 F. 2d 673 (C.A. 2, 1953).

With the Tax Court (S.R. 138), we believe there is no conflict or incompatibility between this Court's decision in Commissioner v. Ferrer, 304 F. 2d 125 (1962) and its Billy Rose decision, or between Ferrer and the Tax Court's decision in this case.[11/] Ferrer took its point of departure from Commissioner v. Golonsky, 200 F. 2d 72 (C.A. 3, 1952), cert. denied, 345 U.S. 939 (1953), and this Court's decision in Commissioner v. McCue Bros. & Drummond, Inc., 210 F. 2d 752 (1954), cert. denied, 348 U.S. 829 (1954), holding that a tenant's surrender of his leasehold to his landlord was a sale or exchange of a capital asset.[12/] It is hardly surprising that common law judges should have regarded a leasehold as sounding more in property than in contract, and its surrender as more closely resembling a sale than the release of a contractual obligation. That is not the first time that we have found statutes written not on blank pages, but on palimpsests. This Court in McCue did not consider that

11/ The Court's reference (S.R. 18) to 14 B.C. Ind. & Comm. L. Rev. 183 (1972), commenting upon the asserted inconsistency, was made without reference to the quality of the student work. Among other deficiencies, it clearly fails to understand that "capital asset" and "sale or exchange" present different, and separate, questions. For a clearer understanding, see Commissioner v. Gillette Motor Co., 364 U.S. 130, 133 (1960).

12/ But for the legislative ratification of those decisions in Section 1241, some question may be raised whether their authority was not to some extent impaired by the Supreme Court's later decision in Millinery Corp. v. Commissioner, 350 U.S. 456 (1956).

it was questioning the authority of Commissioner v. Starr Bros., Inc., 204 F. 2d 673 (C.A. 2, 1953), decided only a year earlier,[13/] or of the earlier decision in Bingham v. Commissioner, 105 F. 2d 971 (C.A. 2, 1939), both holding that discharge of a contract obligation was not a sale or exchange.[14/] Neither did the later decisions in Graham v. Commissioner, 304 F. 2d 707 (C.A. 2, 1962) and in Pittston Co. v. Commissioner, 252 F. 2d 344 (C.A. 2, 1958), cert. denied, 357 U.S. 919 (1958), relying as they did on the Bingham and Starr Bros. decisions, purport to question McCue.

Ferrer, following Golonsky and McCue, found that the taxpayer owned a property interest in a copyright, and made a sale when he surrendered or transferred his property interest. For present purposes, we can accept the analysis of literary property rights and the analogy to Golonsky and McCue. The present taxpayer, with a potential contract claim to damages from CBS,[15/] had and transferred no similar property interest.

13/ Judge A. N. Hand, who wrote the opinion in the McCue case, was on the panel that decided Starr Bros.

14/ Both cases followed and applied the Supreme Court's decision in Fairbanks v. United States, 306 U.S. 436 (1939).

15/ Farrell Lines, Inc. v. City of New York, 30 N.Y. 2d 76, 281 N.E. 2d 162 (1972); cf. Bowes v. Saks & Co., 397 F. 2d 113 (C.A. 7, 1968).

If Ferrer goes further, to suggest that Section 1241, or other particularized legislative modifications of Section 1222, indicate (304 F. 2d, p. 131) "Congressional disenchantment with this formalistic distinction",[16/] i.e., between sale and release of an obligation, then we must agree with the Court that it was engaging in (304 F. 2d, p. 131) "rather treacherous business." The distinction, however it is regarded, is not only historic and explicit in the Internal Revenue Code, but was made the more explicit and certain by the Supreme Court's decision in Fairbanks v. United States, 306 U.S. 436 (1939). With respect to a limited class of obligations, the Congress thereafter modified the statute (and to that extent the Fairbanks decision) by what is now Section 1232(a) of the Internal Revenue Code of 1954. But except as modified in highly particularistic detail, the Fairbanks decision is as authoritative today as it was when decided, as this Court recognized in Graham v. Commissioner, 304 F. 2d 707 (1962). See Treasury Regulations on Income Tax (1954 Code), §§1.1232-1 and 1.1232-2. See also, 1 Surrey, Warren, McDaniel and Ault, Federal Income Taxation 969-974.

Another example of limited modification relevant in this case concerns Helvering v. Flaccus Leather Co., 313 U.S. 247 (1941), holding that proceeds from insurance on a destroyed

16/ But cf. Pounds v. United States, 372 F. 2d 342, 351 (C.A. 5, 1967 (Judge Wisdom).

building were not proceeds of a sale or exchange, and therefore did not give rise to capital gain. The Congress, by Section 151(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798, added Section 117(j) to the Internal Revenue Code of 1939, the predecessor of the present Section 1231. It thereby modified the statute (and to that extent the Flaccus decision) to provide capital treatment to net gains from specified transactions, including involuntary conversions. But, despite taxpayer's criticism of the Flaccus decision, it remains completely authoritative with respect to losses.[17/] See Treasury Regulations on Income Tax (1954 Code), §1.1231-1(a).

The Ferrer decision has been appraised with patent scepticism by thoughtful scholars. See Andrews, Federal Income Taxation 687-688; 1 Surrey, Warrent, McDaniel and Ault, Federal Income Taxation 1040-1054. As we have stated, we do not believe that what we take to be the decision is inconsistent with the Billy Rose opinion and decision or with the decision of the Tax Court in this case. But its comment upon other decisions of this Court and what may be the peripheral implications of its opinion may well be inconsistent with a large body of decisions of this and other Courts. The limited issue in this case hardly calls for

17/ The legislative classification of such losses, even for the limited purpose of determining whether there are net gains, has proven difficult and complex. See S. Rep. No. 91-552, 91st Cong., 1st Sess., pp. 204-206 (1962-3 Cum. Bull. 423, 553-554).

the Court to undertake the comprehensive review that would be required to determine and eliminate the possible inconsistencies.

Taxpayer (Br. 32-41) invokes the recent decision of the Supreme Court in Central Tablet Mfg. Co. v. United States, 34 A.F.T.R. 2d 5200 (June 19, 1974). But, as the opinion in that case makes obvious, it dealt only with the scope of Section 337, governing certain corporate liquidations. When two courts extended Section 337 beyond its terms to cover involuntary conversions from fire losses because they felt that the Congress could not have intended to exclude them from the non-recognition benefits conferred by Section 337, the Commissioner accepted those decisions and did not further contest the point. This judicial graft upon Section 337 presented the problem of dealing with cases where a fire occurred prior to adoption of a plan of liquidation, but insurance proceeds were received thereafter. Nothing in the Supreme Court's solution of this judicially created problem has bearing upon this case.

II

THE COMMISSIONER'S ERRONEOUS CONCESSION IN THE BOSTON FISH MARKET CASE DOES NOT CALL FOR THE COMPOUNDING OF THAT ERROR IN THIS CASE

On remand of this case to the Tax Court, counsel for the Commissioner acknowledged that the concession of capital gain treatment in Boston Fish Market Corp. v. Commissioner, 57 T.C. 884 (1972) was erroneous. (S.R. 85-87.) The Tax Court accepted

that acknowledgment, pointed out that it had not decided the conceded issue, and stated that its decision might well have been otherwise had it considered the question. (S.R. 136-137.) A large staff acts for the Commissioner and the Chief Counsel, in regional offices as well as in Washington. Though uniformity in treatment of all taxpayers is a goal assiduously sought by publication of rulings and other means, it is a goal that probably can never be perfectly achieved. This Court is not unfamiliar with instances in which issues latent in a case have not been perceived at the early stages. See, e.g., Commissioner v. Gordon, 382 F. 2d 499 (C.A. 2, 1967), rev'd, 391 U.S. 83 (1968). To permit one taxpayer to escape payment of the taxes he lawfully owes because a representative of the Commissioner had made an error in a similar but otherwise unrelated case would reduce administration of the Internal Revenue Code to the lowest discoverable level.

Absent systematic discrimination or differing treatment of taxpayers in competitive or similar relationships, one taxpayer's escape from payment of the amounts justly owed is no defense for another. Wagner v. United States, 387 F. 2d 966 (Ct. Cl., 1967). See Snowden v. Hughes, 321 U.S. 1, 8 (1944). Justice Frankfurter, concurring in that decision, wrote as follows (321 U.S., p. 15):

> The talk in some of the cases about systematic discrimination is only a way of indicating that in order to give rise to a constitutional grievance a departure from a norm must be rooted in design and not derive merely from error or fallible judgment.

The Supreme Court has not hesitated to reach different results in similar cases where, though the facts were almost exactly parallel, the deficiency asserted at the administrative level in one case was on grounds less persuasive than those advanced in the other. See Helvering v. Clifford, 309 U.S. 331 (1940), and Helvering v. Wood, 309 U.S. 344 (1940), decided on the same day. Cf. John Kelley Co. v. Commissioner, 326 U.S. 521 (1946), where two single-member panels of the Tax Court decided parallel cases differently, and the Court upheld each.

Though the erroneous concession in the Boston Fish Market case was regrettable, we believe it clear that it affords no reason why this case should not be decided on its merits which, as we believe, call for upholding the deficiency asserted by the Commissioner.

CONCLUSION

The decision of the Tax Court should be affirmed.

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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing brief has been made on opposing counsel this 27th day of September, 1974, by mailing four copies thereof in an envelope, with postage prepaid, properly addressed to them as follows:

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